

***United States Court of Appeals
for the Second Circuit***



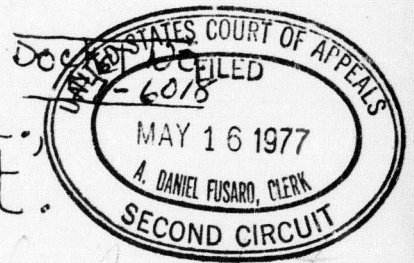
**APPELLANT'S
BRIEF &
APPENDIX**

77-6018

Noland Coles,
Plaintiff.

B

- Against -
Sunshine Biscuits, Inc.,
Defendant.



Brief and Appendix of Appellant

July 11, 1974 the plaintiff,
Noland Coles, was employed by the
defendant, Sunshine Biscuits, Inc.

On or about October 21, 1974
Coles enlisted in the United States
Marines, October 21, was also
Coles last day of employment
at the defendant, Sunshine -
Biscuits. The question at this
time is if Coles left to enter
the military before he was
suspended from work? This
question answers itself, for
Coles was re-employed by

PAGINATION AS IN ORIGINAL COPY

Sunshine Biscuits Inc. in Sept. 1975. Within the meaning of 38 U.S.C. §2021 Coles was entitled to re-enstatement when he first applied for re-employment in March, 1975. This should justifiably assure that Noland Coles is indeed entitled to his back wages from March 1975 to the day he was re-employed in September 1975.

Respectfully

Yours

Noland L. Coles
(Plaintiff)

1512 Union St. Apt 3C.
Brooklyn, New York 11213

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PLAINTIFFS

COLES, NOLAND
NOLAND COLES

DEFENDANTS

SUNSHINE BISCUITS, INC.
SUNSHINE BISCUITS, INC.

77-6018

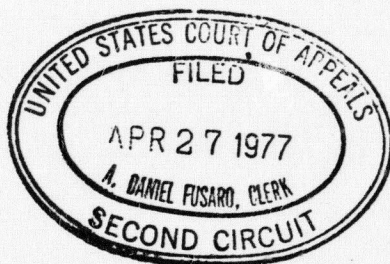
CAUSE

38 USCA 2022(Cum. Supp. 1976) Recover lost earnings

ATTORNEYS

David G. Trager
By: Lewis F. Tesser

FOR DEFT:
CHADBOURNE, PARKE, WHITESIDE &
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(212) 541-5800



77-6018

☐ CHECK HERE IF CASE WAS FILED IN FORMA PAUPERIS	FILING FEES PAID			STATISTICAL CARD	
	DATE	RECEIPT NUMBER	C.D. NUMBER	CARD	DATE MAI
				JS-5	
				JS-6	

60 1376

COLES

VS

SUNSHINE BISCIUT, INC.

DATE	NR.	PROCEEDINGS
7-23-76		Complaint filed. Summons issued. (1)
8-6-76		Summons ret. and filed./ excuted. (2)
8-30-76		ANSWER filed. (3)
8-31-76		Copy of memo from Judge Dooling setting 10-19-76 for conf filed. (4)
10-21-76		Before DOOLINGJ-Conf. convened & concluded. Trial set for 12-27-76. Conf. adj'd/
10-22-76		By DOOLING, J.- Conference memo and order dtd. 10-20-76 setting trial for 12-27-76 etc., filed. (5)
11-8-76		Notice of motion ret. 11-19-76 with memo of law for summary judgment filed. (6/7)
11-16-76		USA's counterstatement with memo of law in opposition to defts motion for partial summary judgment filed. (8)(9)
11-19-76		Defts reply memo of law in support of motion for summary judgment filed. (10)
12-13-76		By DOOLING, J-Memo & Order dtd 12-13-76 deft's motion for summary judgment is granted, and the Clerk is directed to enter judgment dismissing the action. (11)
12/15/76		Judgment that the plaintiff take nothing of the deft and that the defts motion for summary judgment is granted and the action dismissed on the merits, without costs, filed. (12)
12-29-76		Notice of motion to alter and vacate judgment ret 1-14-77. (13)
1-12-77		Affidavit in opposition to plttf's motion to vacate filed w th memo of law. (14/15)
1/14/77		Before Dooling, J.-case called-motion to alter & vacate judgement argued-motion denied.
1/14/77		Notice of appeal filed re granting deft's motion for summary judgement and dismissing the action. Copy of notice & docket entries mailed to C of A. (16)
1/19/77		By DOOLING, J. dtd 1/18/77 MEMORANDUM AND ORDER that plttf's motion to alter and vacate the judgment entered 12/15/76 is denied, filed. (17)
1-26-77		Sten. transcript dtd 1-14-77 filed. (19) (18)
2/2/77		Amended notice of appeal filed-copies mailed to C of A. (20)
2/8/77		Civil Appeal Scheduling order dtd 2/4/77 filed. (20) 4
3/9/77		Scheduling order received from the C of A that the record be docketed on or before 3/21/77. (21)

A TRUE COPY
ATTEST
DATED April 21 1977
LEWIS ORGEL
BY M. Glenn
CLERK
DEPUTY CLERK

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.
★ JAN 19 1977 ★

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

NOLAND COLES,

Plaintiff,

-against-

SUNSHINE BISCUITS, INC.,

Defendant.

TIME AM
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M'FILED

: 76 C 1376

: MEMORANDUM

: and

: ORDER

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The judgment dismissing plaintiff's action on the merits was entered on December 15, 1976. December 24th and 25th were legal holidays and December 26th was Sunday. Plaintiff's motion under Rules 59(e) and 60(b) (6) was not received by defendant's counsel until December 29th, and it was received in an envelope postmarked December 28 P M. However, the affidavit of service made by the Assistant United States Attorney states that the motion papers were deposited in the mail chute drop in the Courthouse on December 27, 1976, and the two supporting affidavits were sworn to on December 27th. It is concluded that the motion was timely as a motion under Rule 59(e) (see Rule 6(a)).

In the circumstances of this case, the motion for summary judgment is reconsidered and account is taken of plaintiff's affidavit and the material adduced by defendant from

plaintiff's file at the headquarters of the New York United States Marine Corps Recruiting Office. The new material leaves no doubt that plaintiff was at the enlistment station on October 17th and October 18th, and that he nevertheless went to work on his afternoon shift job on both days, and that his date of enlistment was October 22, 1974. Plaintiff states that he took the oath of enlistment in the early afternoon. On that day, plaintiff states, he was told to report for active duty on January 27, 1975. The report date was later advanced to January 24, 1975.

Plaintiff does not say in his affidavit that he went to the job on October 23rd, and he seems not to adopt the statement earlier made on his behalf that he did go to the job on October 23rd to explain his change of status (see affidavit of December 27, 1976, paragraph 7). He says that he mailed a notice (Exhibit A annexed to his affidavit) to Sunshine, presumably on October 23d, 1974, signed by a Marine Corps sergeant to the effect that plaintiff was "Taking A Leave Of Absence To Enlist In the UNITED STATES MARINE CORPS On 23 October 1974." Passing the staggering improbability that Exhibit A is authentic (see Malkowski affidavit of January 7, 1977 and Exhibit 4), the set of

facts that plaintiff now argues that he could support with evidence is that he took leave of absence to join the armed forces on October 23rd before he was terminated from his job. He says (affidavit of December 27, 1976, paragraph 9)

"I left my position with Sunshine upon my induction, although I did not expect to report for active duty until January 27, 1975, with the intent and purpose of winding up my personal affairs before entering active service."

But that is not enough to accrue the right of reemployment; it does not constitute leaving a position in the employ of an employer "in order to perform such training and service." Plaintiff had worked for Sunshine only a little over three months and he was not to enter upon the performance of his training and service for three months.* It follows that the motion to set the judgment aside may not be granted.

It is

ORDERED that plaintiff's motion to alter and vacate the judgment entered December 15, 1976, is denied.

*It is not altogether clear that plaintiff did not enlist in the Marine Corps Reserve with a conditional right to enlist in the Corps. See Ostling affidavit of January 10, 1977, Exhibit 4. See 38 U.S.C. 2024(a). The enlistment contract was signed January 24, 1975.